BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL M. THRASHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,766
PETROLEUM TERMINALS, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the April 4, 2012 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Claimant appeared by Keith L. Mark, of Mission, Kansas. Respondent and its insurance carrier (respondent) appeared by Kevin J. Kruse, of Overland Park, Kansas.

ISSUES

The Administrative Law Judge (ALJ) found that claimant sustained personal injury by a series of repetitive traumas to his left shoulder and awarded claimant medical treatment.

Respondent maintains claimant did not sustain a series of repetitive traumas but rather sustained only a single accidental injury on March 1, 2011. With regard to that accident respondent contends claimant neither provided timely notice nor served timely written claim. Respondent stipulates that if it is found claimant did sustain a series of repetitive traumas, notice is timely. Respondent asks that the preliminary hearing Order be reversed and compensation denied.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and the briefs of the parties, the undersigned Board Member finds the following facts:

Claimant, who is age 53, was employed by respondent as a truck driver. Claimant operated tanker trucks and delivered liquid petroleum products. His duties included loading fuel into the tanker, which necessitated connecting and disconnecting lines through which the product flowed; hooking and unhooking trailers, which required cranking the dollys up and down; driving to and from his destinations; and getting into and out of the cab at each stop up to 60-70 times per route. Claimant's job required him to drag hoses used to unload the fuel. Claimant made multiple stops for each load. The shorter routes required more stops. Claimant testified that the hoses he moved were four inch hoses from 10 to 20 feet long, weighing in the 40-50 pound range

On March 1, 2011, claimant was experiencing weakness and pain in his left ankle, which he previously fractured in June 2010. Claimant was pulling himself up into the cab with his right hand grasping the grab bar, which was wet due to weather conditions. He was grabbing the armrest of the open door with his left hand. His right hand slipped from the grab bar, causing his weight to shift and "jerk" his left arm and left shoulder. He experienced immediate pain in his left shoulder and neck.[1]

Claimant testified he did not report the incident at the time because he had just returned to work from being off for his broken ankle, which resulted from a work-related injury and he was afraid he would be fired if he reported another injury.[2] Claimant continued to work regular duty[3] hoping that his left shoulder and neck would resolve. However, the shoulder worsened. Claimant attributed the worsening to his continued performance of his job, particularly moving the hoses and getting in and out of the cab. Claimant left his employment with respondent on or about August 16, 2011.

Claimant testified after the March 1, 2011 incident, he experienced pain in his left shoulder for about three weeks. The shoulder pain subsided, but he then developed numbness, tingling, and loss of strength. The weakness increased as claimant continued to perform his regular duties. Claimant tried to continue to use his left upper extremity, however, by August 2011, claimant could barely move his left arm.

Mark Waterworth, director of transportation for respondent, testified that he had experience driving the type of truck claimant drove. He testified that to get into the truck a driver has to step up 12 inches onto the first step while grasping the grab bar with the right arm. The driver would then grab the steering wheel with the left arm. Mr. Waterworth

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[1] P.H. Trans. at 9.

[2] P.H. Trans. at 10.

[3] There is evidence claimant's work week was reduced to four days per week, however, that reduction resulted from claimant's previous ankle fracture.

testified that claimant's description about how he got into the cab of the truck reflects an unusual way to do so.[4]

Mr. Waterworth denied claimant reported difficulty getting into the cab of his truck because of left shoulder problems. He testified that the job claimant performed required getting in and out of the truck only 9 to 18 times per day. He disagreed with claimant about the weight of an empty hose, which he estimated at 30-35 pounds, although he admitted handling hoses required the use of both hands. It made no sense to Mr. Waterworth that someone with an injured left shoulder would continue to pull themselves in and out of a truck. Mr. Waterworth testified that he doesn't consider claimant's job to be physically demanding, but had no knowledge of claimant's incident.[5]

The medical exhibits offered into evidence at the preliminary hearing did not include the record of claimant's initial left shoulder treatment with his personal care provider, Dr. William D. Walters, on March 22, 2011. There is in evidence a chart entry from Dr. Walters dated June 29, 2011. That visit is described as "recheck of Shoulder Pain."[6] There is a history in that record that claimant hurt his shoulder on March 1 when he pulled himself into his truck, however, the same entry states that claimant's "course has been worsening."[7]

A narrative report authored by neurosurgeon E. Jerome Hanson, M.D., to whom claimant was apparently referred by Dr. C. Craig Saterlee, an orthopedic surgeon, contains a history concerning the onset and progression of claimant's left shoulder symptoms which is consistent with claimant's testimony. The only other medical evidence in the record is from Dr. Greg J. Folsom, an orthopedic surgeon, however, those records concern only claimant's left ankle and are immaterial to this claim.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(c) provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[4] P.H. Trans. at 33.

[5] P.H. Trans. at 40-41.

[6] *Id.*, Resp. Ex. B at 1.

[7] *Id.*

K.S.A. 2011 Supp. 44-508(h) provides:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d)(e)(f)(g) also provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

Claimant sustained his burden of proof that he sustained personal injury by a series of repetitive traumas from March 1, 2011 through August 16, 2011. Although claimant's left shoulder injury commenced when he slipped upon entering the cab of his truck on March 1, 2011, the preponderance of the evidence supports the ALJ's finding that claimant sustained further personal injury as he continued to perform his regular duties.

While claimant experienced pain immediately following the left shoulder injury on March 1, 2011, claimant thereafter developed symptoms of tingling and numbness. Moreover, claimant began to have loss of strength in the left shoulder which, according to claimant's testimony, worsened from its onset through August 16, 2011. Claimant attributed the onset and worsening of his symptoms to the performance of his job. That job, according to both claimant and Mr. Waterworth, was a physically vigorous one, requiring the use of both arms and both shoulders to drive; to connect and disconnect lines so that the tanker could be filled; to hook and unhook trailers requiring cranking to dolly the trailer up and down; to haul hoses of 10-20 feet in length, weighing at least 30- 35 pounds; and getting into and out of the cab of his truck multiple times per route. By August, 2011, claimant could hardly use his left upper extremity.

The medical evidence, consisting of records from Dr. Walters and the report of Dr. Hanson, corroborates claimant's allegations of a series of repetitive traumas. The only other medical in the record concerns claimant's prior ankle injury, not the left shoulder injury.

The primary factor, as defined in the New Act, in causing claimant's shoulder injury was claimant's employment and the duties it required claimant to perform on March 1, 2011 and continuing until claimant left the employ of respondent on August 16, 2011. There is no evidence of any other factors, preexisting or otherwise, which played any role in causing claimant's injury. Claimant's repetitive traumas resulted from a risk associated with claimant's employment and was not caused by a personal, neutral, or idiopathic risk. Respondent does not contend otherwise.

Given respondent's stipulation that notice is timely if claimant is found to have sustained a series of repetitive traumas, the notice issue is moot and will accordingly not be addressed by the Board at this time. The written claim requirement was repealed by the New Act and will also not be addressed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

(1) Claimant sustained a series of repetitive traumas commencing on March 1, 2011 and continuing through August 16, 2011, causing injury to claimant's left shoulder and possibly his cervical spine.

(2) Given finding (1), respondent's stipulation regarding notice, and since this claim is governed by the New Act, the issues of notice and timely written are moot and will not be addressed by the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 4, 2012, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge